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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1010

OHIO MUNICIPAL JUDGES ASSOCIATION, *et al.*,
Appellants,

—against—

ARTHUR DAVIS, *et al.*,
Appellees.

On Appeal From the United States District Court For the Northern District of Ohio, Eastern Division

MOTION FOR LEAVE TO FILE BRIEF, *AMICUS CURIAE*, AND BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF OHIO, INC. *AMICUS CURIAE*

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MOTION OF AMERICAN CIVIL LIBERTIES UNION OF OHIO, INC. FOR LEAVE TO FILE BRIEF, *AMICUS CURIAE*

Pursuant to Rule 42(3) of the Rules of this Court, the American Civil Liberties Union of Ohio, Inc. respectfully moves for leave to file a brief *amicus curiae* in the above entitled case. The attorney for appellant and the attorneys for all appellees, save one, have consented to the filing of the attached brief.[1] The attorney for appellee Richard L. Ditto, Laurence Huggman, orally refused the request for consent.

The American Civil Liberties Union of Ohio, Inc. (ACLUO) is a non-profit corporation, incorporated under the laws of the State of Ohio and dedicated to protecting the constitutional rights of all persons. For many years its attorneys have represented parties in this Court and the lower courts, and it has participated as *amicus curiae* in this Court and other courts.

[1] The letters of consent have been filed with the Clerk of the Court.

ACLUO has successfully litigated hundreds of suits attacking discriminatory and illegal practices of state, county and municipal authorities affecting the lives and liberties of diverse minority groups. Many times the challenges have rested upon the irreconcilability of the practice of not including a minority group within the benefit conferred by a statute with the spirit and intent of the Fourteenth Amendment to the Constitution of the United States. Often times, this problem of under-inclusion is remedied by the affirmative action of the Court.[2]

Here, appellees seek to narrow the available remedies the Courts will have at their disposal to alleviate violations of the equal protection clause. Since the decision of the Court in this litigation will affect the scope of the Fourteenth Amendment, ACLUO deems it important to bring to the Court's attention some of the implications of the issues presented here.

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[2] *See, e.g., Gomez v. Perez*, 41 U. S. L. W. 4174 (U. S. January 17, 1973) (allowing illegitimate children to obtain child support, along with legitimate children, from their natural fathers); *Robinson v. Johnson*, No. 72-434-G, 41 U. S. L. W. 2364 (D. Mass. January 4, 1973) (allowing conscientious objectors who have served 180 days or more of alternative service to receive veterans' benefits).

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BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF OHIO, INC. *AMICUS CURIAE*

INTEREST OF *AMICUS CURIAE*

This interest of *Amicus Curiae* is set out in the Motion for Leave to File, *supra.*

THE QUESTION PRESENTED

Whether a group of persons within a class who are excluded from receiving benefits conferred by a state upon others in the same class have standing to raise the denial of equal protection of the law.[1]

[1] The question presented by *amicus curiae* is a consolidation of the questions presented by appellants in their jurisdictional statement. Further, it excludes from consideration the question of the denial of equal protection of the law. It is *amicus curiae's* belief that this issue need not be reached since, as will be shown under Argument, the lower court did not reach the question. Hence, if standing is present, the Court should simply reverse and remand the case to the district court for resolution of the additional issue.

STATEMENT OF THE CASE

In May, 1968, the people of Ohio adopted a revised Article IV of the Constitution of the State of Ohio, a comprehensive amendment which reorganized and modernized the judicial system of Ohio. The amendment, known as the "Modern Courts Amendment", provides, in part, as follows:

> "The judges of the Supreme Court, Court of Appeals and of the Courts of Common Pleas shall . . . receive . . . compensation . . . which shall not be diminished during their term of office . . ."

Article IV, §6(B) of the Ohio Constitution. Until March 11, 1972, when the Ohio Supreme Court ruled in *Ex rel Wallace, Judge, Celina Municipal Court v. City of Celina*, 20 Ohio St. 2d 109, 279 N.E.2d 866 (1972), most observers believed that the implied exemption in Article IV, §6(B) to the restriction imposed by Article II, 20 of the Ohio Constitution,[2] which does not allow any increase in salary during a judge's existing term of office, included municipal judges.

The Supreme Court of Ohio construed Article IV, to be applicable in all respects to municipal court judges with the sole exception of the exemption from Article II, §20. 20 Ohio St.2d at 113, 279 N.E.2d at 869.

The district court refused to entertain appellants challenge to this constitutional anomaly on the ground that since invalidating Article IV, §6(B) would result in precluding all Ohio Judges from receiving raises of salary rather than municipal judges receiving increases,

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[2] Article II, §20 of the Constitution of the State of Ohio, reads, *inter alia*, as follows:
"The General Assembly in cases not provided for in this Constitution shall fix the term of office and the compensation of officers; but no change therein shall affect the salary of any officer during his existing term unless the office be abolished."

plaintiffs lacked standing to raise the equal protection argument.[3]

Argument

Where State Laws Are Defective Because of Underinclusion, the Reviewing Court Can Fashion Viable Remedies.

The district court reasoned that plaintiffs could not attack Article IV, §6(B) as denying them equal protection under the laws since even if the exemption was found to violate the Fourteenth Amendment to the United States Constitution, the Court would be powerless to remedy the situation. This inability to grant to plaintiffs the relief sought, according to the court below, required the dismissal of the complaint "without the necessity of deciding the constitutional issue".[4]

What the district court failed to realize is that "[w]here a statute is defective because of underinclusion there exists two remedial alternatives . . ." *Welsh v. United States*, 398 U.S. 333, 361 (1970) (Harlan, J., Concurring). Mr. Justice Harlan pointed out that a court might declare the statute a nullity or it may, in some circumstances, extend it to "include those who are aggrieved by exclusion". 398 U.S. at 361-62; *cf., Skinner v. Oklahoma*, 316 U.S. 535 (1942).

The problem, then, with the decision of the district court is that the court was not without a remedy which

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[3] Although the Court did not use the word "standing" in its opinion, it is the clear import of the holding. In fact, the decision seems to be something of a hybrid: part failure to state a claim upon which relief can be granted, Fed. R. Civ. P. 12(b)(6); and part "standing".

[4] Accordingly, this Court is presented with the single question of standing and does not need to, and in fact should not, reach the question of whether or not the Ohio laws violate the equal protection clause. For the sake of argument, *amicus curiae* will assume, as did the Court below, that the Ohio constitutional scheme does violate the United States Constitution. If the Court decides that plaintiffs have standing, the case should be remanded to the lower court to decide the ultimate issue.

it could have applied. Certainly there was no "inability to grant to plaintiffs the primary relief sought" since the court had the power to render the Ohio laws constitutional. 398 U.S. at 355-56; *Robinson v. Johnson*, No. 72-434-G, 41 U.S.L.W. 2364, 2365 (D. Mass January 4, 1973).

In order to have justified extending the coverage to include those who were aggrieved by exclusion the district court needed only to decide whether it was more nearly the will of the people of Ohio to eliminate their policy altogether or extend it in order to achieve what was plainly intended. 398 U.S. 355-56. In the case at bar, the intention of the people of the state of Ohio is unquestionable — the now Article IV, §6(B) was summarized for the ballot, in pertinent part, as follows:

> "To Equalize *Judges'* salaries and to allow Increases in compensation during term"
>
> Emphasis added.[5]

Nor does it defeat the court's power to expand Article IV, §6(B) to hold, as did the lower court, that a court, in determining the issues before it is bound to apply the construction applied by the state supreme court. A. 23. Such a holding misconceives the kind of legislative intent which is used to expand a law in order to avoid eliminating it. Its justification cannot be by resort to legislative intent, as that term is usually employed, but by a different kind of intent, namely whether the law makers would rather have the court discard the law altogether or extend it to include a class not within the statute as written in order to render what the state plainly did intend, constitutional. 398 U.S. at 354. Hence, the interpretation by the state supreme court as to the meaning of the law when passed is irrelevant.

[5] The complete summary of the modern courts amendment as it appeared on the ballot is included herein as Appendix A.

In short, the district court held that persons aggrieved by actions of the state are to go unrectified. We hope that this Court will not allow this absurd result to remain as a bar to relief by persons excluded from benefits conferred by state statute upon others within their class.

This Court and the lower courts have often expanded rather than retracted statutes to preserve equality. *See, e.g., Gomez v. Perez*, 41 U.S.L.W. 4174 (U.S. January 17, 1973); *Levy v. Louisiana*, 391 U.S. 68 (1968); *Robinson v. Johnson*, No. 72-434-G, 41 U.S.L.W. 2364 (D. Mass. January 4, 1973).[6] The district court had an effective remedy and simply erred in holding otherwise.[7] Since its decision was bottomed on this erroneous ruling, the Court should reverse and remand this case to the district court for a determination of the ultimate issue: Are the Ohio municipal judges being denied the equal protection of the laws?

---

[6] It is impossible to reconcile the argument used by the district court here, with the results reached by this Court in both *Gomez* and *Levy*. If the Court could only strike down the state statutes conferring a benefit on legitimate children, the result would have been that all children were excluded from the benefits of the statutes involved and illegitimate children would have gained nothing. Under the rationale of the district court, such a result would have required a dismissal of the *Gomez* and *Levy* cases without deciding the constitutional issues.

[7] The district court could have avoided the problem of how to remedy the underinclusion by focusing its attention on Article II, §20 rather than Article IV, §6(B). If analyzed in this manner, the problem becomes one of overinclusion, not underinclusion. That is, Article II, §20 violates the equal protection clause by including *only* municipal judges. The district court could have enjoined the application of §20 to municipal judges without defeating the sections applicability to other office holders. *United States v. Jackson*, 390 U. S. 570, 585-86 (1968).

Also, the striking down of Article IV, §6 (b) was not, as the district court implies, a useless remedy. Had the Court declared Article IV, §6(b) unconstiutional the state would have been free to adopt a statute which includes all judges.

CONCLUSION

For the foregoing reasons, the Court should note jurisdiction and, after hearing, reverse the United States District Court for the Northern District of Ohio and remand the case for further consideration.

Respectfully submitted,

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APPENDIX

BALLOT SAMPLE — MAY, 1968

PROPOSED CONSTITUTIONAL AMENDMENT

3 ADMINISTRATION AND ORGANIZATION OF OHIO JUDICIAL SYSTEM

(Proposed by Resolution of the General Assembly of Ohio)
A majority affirmative vote is necessary for passage.

YES	SHALL THE CONSTITUTION OF THE STATE OF OHIO BE AMENDED BY AMENDING SECTIONS 1 AND 2, ENACTING SECTIONS 3, 4, 5 AND 6 AND REPEALING EXISTING SECTIONS 3, 4, 5, 7, 8, 10, 12 AND 14 OF ARTICLE IV AND BY REPEALING SECTIONS 12 AND 13 OF ARTICLE 11 AS ADOPTED IN 1851 TO PROVIDE THAT THE SUPREME COURT SHALL DECIDE ALL CASES BY MAJORITY VOTE, TO FIX THE POWER OF THE SUPREME COURT OF OHIO TO EXERCISE ADMINISTRATIVE SUPERVISION OVER ALL COURTS AND TO MAKE RULES OF PRACTICE AND PROCEDURE, TO PROHIBIT THE ELECTION OR APPOINTMENT TO ANY JUDICIAL OFFICE OF A PERSON WHO SHALL HAVE PASSED THE AGE OF 70 YEARS, TO EQUALIZE JUDGES' SALARIES AND TO ALLOW INCREASES IN COMPENSATION DURING TERM, TO REMOVE THE PROBATE COURT AS A CONSTITUTIONAL COURT AND TO AUTHORIZE THE CONSOLIDATION OF COUNTY PROBATE COURTS AND COURTS OF COMMON PLEAS? *
NO	

* Emphasis added.

APPENDIX A